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IN THE

Supreme Court of the United States

October Term, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Petitioners

v.

NOERR MOTOR FREIGHT, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Third Circuit.

REPLY BRIEF FOR THE PETITIONERS.

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ARGUMENT

I. Respondents' Arguments Disclose That Petitioners' Activities Had No Extra-Legislative Purpose or Consequence

Respondents' brief makes no serious attempt to support the conclusion that petitioners' public relations campaign had, or was intended to have, any economic consequences apart from those caused by governmental action. The section of respondents' brief in which they discuss the alleged "impact" of the public relations campaign is of particular significance in this respect (respondents' brief, pp. 8-9). There respondents in effect concede that there is no evidence that any truckers individually, or the long-haul trucking industry as a whole, lost any customers or any traffic because of injury to good will attributable to peti-

tioners' publicity (respondents' brief, p. 9).[1] Although respondents assert that "The injury was not exclusively legislative", the assertion is unsupported by any facts or citations to the evidence (respondents' brief, p. 8). Their further assertion that the object of the campaign was to "foment resentment and hostility" (*ibid*) is also not supported by any citations to the evidence which even remotely suggest that the alleged resentment and hostility had or was intended to have any economic consequences except those flowing from governmental action.[2] Indeed, it is to be noted that both of these assertions are immediately followed in respondents' brief by references to legislative activity in New Jersey, Pennsylvania, New York, Indiana,

1. At page 9 of their brief respondents attempt to explain this failure of proof by reference to their stipulation limiting claims of respondent truckers for damages to those resulting from the Pennsylvania veto (paragraph 3, R. 47b). The fact that these respondents voluntarily waived their right to claim damages caused by alleged extra-legislative restraints could not, however, relieve them from the burden of proving the existence of such restraints if they intended to rely upon them in support of their cause of action.

The history leading to the stipulation will not permit the inference that the individual truckers could have proved, but for the stipulation, any loss of traffic or other injury apart from that flowing from governmental action. The stipulation was made after many of the respondents testified on deposition that the only economic consequences of petitioners' campaign were those caused by governmental action. (See petitioners' principal brief at page 40.) If any inference is to be drawn from the stipulation and its history, it is that respondents entered into it because they knew they had suffered no extra-legislative injury.

2. Respondents' brief implies that petitioners have not challenged the District Court's conclusion that their purpose was "to hurt the truckers in every way possible *even though they secured no legislation*" (p. 15, fn. 5). In fact, this conclusion is controverted directly and at length in petitioners' brief, where the exclusively legislative objectives of petitioners are demonstrated by detailed consideration of the evidence about the circumstances surrounding the institution of the public relations campaign, and the content of the materials disseminated in the course of that campaign (petitioners' principal brief, pp. 34-46). Respondents make no attempt to justify the quoted conclusion by a similar analysis of the evidence, or indeed by a citation of or reference to any evidence which might be thought to support it.

and Ohio, and that the only two exhibits cited by respondents in this section of their brief deal solely with petitioners' opposition to the enactment in Pennsylvania of a bill to increase the load limitations on trucks and the consequence of the veto of that bill.[3]

The articles, surveys, reports, and polls which are referred to at pages 5 to 8 of respondents' brief are discussed in petitioners' principal brief at pages 5 to 10 and 34 to 46. Even a cursory reading of the exhibits themselves shows that they dealt with petitioners' legislative arguments that heavy trucks damage existing highways and cause highway hazards and congestion and that the trucking industry does not pay its fair share of the cost of maintaining and building roads to accommodate increasingly heavy vehicles.[4]

The facts with respect to the actual content of the material that petitioners published cannot be changed or obscured by respondents' tactic of selecting colorful characterizations from internal Byoir documents which were never distributed to the public and relating these characterizations to the content of the statements which were actually used in the public relations campaign. For example, the respondents assert that "Byoir described its own anti-truck material as 'poison' to be perpetrated 'upon the defenseless public' " and cite exhibit P-148 in support of this assertion (respondents' brief, p. 6). An examination of that exhibit (R. 202) discloses that it related to a

3. P-53, R. 80-82, cited in respondents' brief at page 8, is an intra-Byoir memorandum captioned "Achievement: Defeat of 'Big Truck' Bill in Pennsylvania". P-169, which is not printed in the Transcript of Record but is at page 34a of Appellants' Appendix in No. 12,750 in the Court of Appeals, is a chart entitled "Additional Revenues To Be Gained From S615, 15 Class I Motor Carriers".

4. An example is provided by respondents' reference to Mrs. Mott's "anti-truck pamphlets" and forums (respondents' brief, p. 7). The subject matter of these pamphlets and of the forums was nothing more than a discussion of "The Effect of Taxes on the American Home" (P-16G, R. 379b) and involved a comparison of governmental policies affecting aid to and regulation of different forms of transportation, including railroads and trucks (P-12, R. 537b-543b).

contemplated article on the subject of toll roads which "really doesn't take any roundhouse swipe at the truckers" and which is not evidence, presumably because it was never published. Nor are the offensive terms with which the truckers are said to have been "labelled" ("five percenters", "evil, sinister wrongdoers", "villains", respondents' brief, pp. 7-8) to be found in the hundreds of pages of material which petitioners publicized. These terms occur only in the two intra-Byoir memoranda cited at pages 7 and 8 of respondents' brief (P-29, R. 173b and P-23, R. 187). There is no evidence that the radio and television programs proposed in P-23 were ever broadcast or that in any published material petitioners adopted the suggestion made in P-29 and capitalized on "the nefarious meaning" of "five percenters" (compare respondents' brief, pp. 4-5, with P-250, R. 590b).

Because of respondents' failure to support the conclusion that the public relations campaign had or was intended to have any consequences except those caused by valid governmental action, it has become apparent that the validity of their argument depends upon whether petitioners violated the Sherman Act by their efforts to obtain legislative action favorable to themselves and adverse to the truckers, even though those efforts had no extra-legislative consequences.

II. Petitioners Did Not Violate the Sherman Act by Seeking Governmental Action Favorable to Their Economic Interests and Detrimental to Those of the Trucking Industry

In arguing that petitioners' efforts to obtain legislation violated the antitrust laws respondents never come to grips with the basic principle which invalidates their argument. This principle can be simply stated: because economic consequences brought about by valid governmental action are by definition not restraints or monopolizations forbidden

by the Sherman Act, concerted efforts which have no consequences apart from those brought about by valid governmental action cannot violate the statute.

To sustain the decision of the courts below, respondents have relied upon the conclusion that petitioners were motivated by an unlawful intent to restrain and to monopolize trade. There is no dispute that it was petitioners' purpose or intent to persuade governmental authorities to take action which would be beneficial to their own interests and detrimental to the interests of the truckers.[5] But to argue as respondents do that this kind of purpose is equivalent to an unlawful purpose to restrain and to monopolize trade is to assume the point in issue. If the consequence to which the purpose is addressed is itself lawful under the Sherman Act, as is the case when the consequence is to be attained solely by valid governmental action, then the purpose to achieve that consequence cannot be unlawful under that statute, for the statute by its terms has no application to concerted action not designed or tending to produce the effects which it prohibits.

Respondents' reliance upon the third-party technique is subject to a similar infirmity. The Sherman Act does not apply to all unlawful, immoral, or improper acts that may be committed jointly in the course of interstate commerce. It is directed against restraints and monopolizations of trade. The nature of activities undertaken in concert is significant under the antitrust laws only as those activities may contribute to restraints or monopolizations prohibited by the statute. The third-party technique, accordingly, can

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5. Respondents emphasize that the District Court found that petitioners had combined and conspired with the intent to eliminate respondent trucking companies as competitors. Contrary to the suggestion made by respondents (p. 3), petitioners have never conceded the existence of any such intent to eliminate all competition by long-haul truckers (see petitioners' principal brief, pp. 34-46) and, in any event, the conclusion of the District Court has no validity apart from the evidence, which shows that, whatever may have been petitioners' purpose, they sought to accomplish it by legislative action.

have no significance in this case unless it in itself produced or helped to produce consequences prohibited by the statute. Since the third-party technique here had no consequences apart from valid governmental action, the result of which cannot violate the statute, the use of that technique cannot give rise to Sherman Act liability.[6]

III. PMTA Is Not Entitled to Recover Damages

Respondents now contend that petitioners waived any argument that PMTA has no right to recover damages by failing to file an appropriate pleading. Actually petitioners' answers put the right of PMTA to recover damages squarely in issue and fully complied with every requirement of the Rules of Civil Procedure. From the ambiguous generalities in respondents' complaint, it was unclear whether PMTA was claiming damages for injury to its own business or in a representative capacity.[7] The answers filed by petitioners fairly met both claims. The

6. The point is illustrated by *Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 135 (D. Mass. 1959), cited in respondents' brief. There one of the means involved (solicitation of advertising by persons whose affiliations were not disclosed) was directly related to the achievement of monopoly power, unsanctioned by governmental action—a result which section 2 of the Sherman Act condemns if obtained by methods "not honestly industrial". The decision has no relevance to the problem here involved where the results were to be achieved by governmental action.

7. Respondents' complaint identified respondents as representatives of a class (paragraph 1, R. 1-2) and claimed only that they had been damaged "by increased expense of operation, loss of accounts, and loss of profits and prospective profits" (paragraph 28, R. 10-11). The respondents themselves pleaded their inability to specify their damages with exactness or precision and contented themselves with a claim of damage to the entire class which they purported to represent (paragraph 30, R. 11).

Even now, after almost 8 years, a trial, and an appeal, PMTA's position is still ambiguously stated. At one point in their brief respondents assert (page 25): "As a trade association PMTA has standing to protect the interests of itself and its members". At another point respondents assert (page 27): "PMTA has recovered only the damages sustained by it, not the individual truckers".

general allegations of a right to recover damages were expressly denied and a separate defense specifically stated that the respondents, who of course included PMTA, had no right to assert any representative claim. (See, e.g., answer of ERPC, paragraphs 28, 30, and 36, R. 6b, 7b, and answer of The Pennsylvania Railroad Company, paragraphs 28, 30, and 32, R. 15-16.) No additional pleading was either required or, for that matter, appropriate.

In effect, respondents now argue that PMTA should be awarded damages in a representative capacity because the trucker respondents will not otherwise be able to recover sums they may have contributed to PMTA to defend themselves against petitioners' public relations campaign. Months before PMTA particularized its damage claim, the trucker respondents voluntarily entered into a stipulation which prevents them from claiming such sums as items of damage for themselves.[8] To permit PMTA to recover as their representative would thus in effect be to give the trucker respondents money damages which they have expressly disclaimed. The decisions cited in petitioners' brief in chief (pages 49-50) establish that a trade association cannot recover money damages for injury to property of its members but can recover such damages only for injury to its own business or property. The decisions cited by respondents in their brief in support of the proposition that a trade association has standing to protect its members' interests (page 25) do not arise under the antitrust laws, do not relate to money damages and are therefore not in point. Finally, any notion that the sum awarded PMTA represents amounts contributed to it by the trucker respondents is contradicted by the fact that the damages awarded to PMTA do not coincide with the trucker respondents' contributions to PMTA. Not all

8. The form of this provision of the stipulation was settled by April 27, 1956, and approved by the District Court on May 17, 1956. The PMTA's answers to interrogatories, which for the first time spelled out its damage claim, were filed September 19, 1956, only 11 days before the trial began.

the trucker respondents were members of PMTA during the period involved in this case and only a few of PMTA's thousands of members are parties in this case.

Nor can the award of damages be justified on the ground that it compensates for injury inflicted upon the business and property of PMTA itself. The opinions of the courts below rest on the premise that the activities of the petitioners were intended to injure and did injure the business of long-haul truckers. Admittedly PMTA is not itself engaged in the long-haul trucking business. It will not suffice to assert, as respondents do, that the "business" of PMTA is to protect the interest of its members. This is merely another way of asserting that PMTA is entitled to recover damages for injury to the business of its members.

PMTA is a nonprofit organization. Unlike the commercial enterprise whose injury by reason of an antitrust violation can be measured in loss of trade or decreased profits, PMTA claims "injury" here only because it made certain expenditures. There is not, nor could there be, any showing that these expenditures were made to mitigate damages which PMTA itself would otherwise have suffered. The expenditures are relied on both to represent the fact of and to measure the degree of "injury", and if they had not been made PMTA would, by hypothesis, have suffered no injury. Nor can it be argued that PMTA's expenditures are a proper element of damages because they were made in an endeavor to mitigate injury to the trucker respondents. There is no principle of antitrust law which would give PMTA the right to recover, on its own behalf, expenditures made to mitigate the damages of others.

CONCLUSION

Petitioners respectfully submit that respondents have advanced no reason in their brief why the judgment of the Court of Appeals should not be reversed and the case remanded with instruction to render judgment for petitioners.

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